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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

The judgment, with which this petition is concerned, was made in favor of the trustees of the NMU Officers' Pension Plan, Abraham E. Freedman, Leon Karchmer and Martin E. Segal. The trustees, as trustees, are or should be vitally concerned with having that judgment sustained. Indeed the remaining parties below also have interests adverse to Mr. Freedman in his individual capacity. Curran and Wall as Landrum Griffin Act (LMRDA) fiduciaries have a duty to sustain the judgment against Mr. Freedman individually. Mr. Perry, against whom Mr. Freedman has the right of subrogation, is also adverse to him.

However, as it appears from the caption of the petition and from the proof of service of the petition, filed with the Clerk of this Court, the plaintiffs alone have been named as respondents and made parties.

Under these circumstances the petition should be dismissed. It would be an idle ceremony to grant a writ against the plaintiffs when the judgment was entered in favor of other parties (See *Stern and Gressman, Supreme Court Practice,* 3d Ed., page 238).

Previous Proceeding

The respondents, members of the National Maritime Union (NMU), with the consent of the United States District Court, brought an action under LMRDA (29 U.S.C. § 501) against Joseph Curran, president of NMU, his assistant William Perry, Shannon Wall, secretary treasurer of NMU and the three trustees of the NMU Officers' Pension Plan, including the petitioner, Abraham E. Freedman, to recover money wrongfully paid by NMU to the trustees and to surcharge the trustees for money wrongfully paid out by them and for other relief not here involved.

An interlocutory summary judgment was entered directing the defendants including the trustees to account. This interlocutory judgment was affirmed by the Court of Appeals for the Second Circuit. This Court thereafter denied applications for writs of certiorari.

Statements, in the nature of accounts, were served and filed by the defendants. The plaintiffs filed objections to the account. These objections were tried.

After trial the District Court found that the NMU officers had wrongfully paid to the trustees $520,283.38, a substantial part of which (about $80,000) had been paid for the account of William Perry, an intimate friend of Joseph Curran, and directed that the trustees refund that sum with interest to NMU. The District Court also found that $222,200.00 had been wrongfully paid out to William Perry by the trustees.

The District Court held that two of the three trustees were negligent but were otherwise innocent of wrongdoing and that the third trustee, the petitioner here, was so recklessly indifferent to his duties as trustee that he should be surcharged for the wrongful payment to William Perry. Judgment was entered against the petitioner for $222,200.00 plus interest. This judgment was affirmed by the Court of Appeals for the Second Circuit and is the subject of the pending application.

Incidentally, judgment was also entered against William Perry for the amount wrongfully received by him with interest. That judgment was also affirmed by the Court of Appeals. The petitioner, Freedman, is entitled to be indemnified when the judgment against Mr. Perry has been paid. The Fund may not collect both the judgment against Freedman and the judgment against Perry. When Freedman has satisfied the judgment against him, he will, by operation of law, take over all rights to the judgment against Perry.

The Real Questions Presented

1. May a trustee of a pension fund established by a labor organization be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds of the labor organization entrusted to his care by the labor organization?

2. May a person appointed by a labor organization as a trustee of a pension fund be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds entrusted to his care by the labor organization?

3. May a trustee under a pension fund established by a labor organization and who, in fact, is under the control of the labor organization, be held to account under LMRDA, 29 U.S.C. § 501, for a wrongful use of the funds entrusted to his care by the labor organization?

4. In an action brought under LMRDA, 29 U.S.C. § 501, to recover money wrongfully paid by a labor organization to a pension fund, may a United States District Court surcharge a trustee for a wrongful use of money so paid?

Respondents' Statement of the Case

The National Maritime Union established, by a membership vote, a Pension Trust Plan for its officers elected by a membership vote.* Funds realized from membership dues were used to fund this Pension Plan.

It came to the plaintiffs' attention that this Officers' Pension Plan had been and was being used by Joseph Curran, as an improper means to siphon large sums of money from the Union to William Perry, an intimate friend of Joseph Curran, and to others. William Perry was not an elected officer of NMU. He was Joseph Curran's hired hand.

With the approval of the District Court, the plaintiffs, members of NMU, brought this action to stop such practice and to recover the money so wrongfully used.

The District Court found that the trustees had wrongfully paid $222,200.00 to William Perry and entered judg-

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* Typical of his tactics the petitioner has printed in his appendix the 1961 amendment to the 1952 Agreement and Declaration of Trust while describing the same in the index as "Agreement and Declaration of Trust * * * dated December 29, 1952." The difference between the two documents is radical and critical. The amendment which petitioner has printed was declared void on the first round of appeals.

The original Agreement and Declaration of Trust dated December 29, 1952 created "for the exclusive benefit of * * * elected officials" of NMU is printed in the cross petitioner's supplemental appendix (SA 51 *et seq.*).

References to the petitioner's appendix filed in this Court will be preceded by A.

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ment surcharging the petitioner, Abraham E. Freedman, in that amount with interest.

As a basis for the surcharge the District Court found that the petitioner (A30-31):

> "Freedman acted simultaneously as a trustee, counsel to the trustees, and counsel to NMU. He had drawn the Perry contract, and represented Perry in the earlier stages of this litigation. The evidence shows that he dictated his legal opinion from the top of his head while in Philadelphia and had his name signed to it by Sovel. He showed a reckless indifference to his duty as a trustee as well as the interests of his fellow trustees, who relied on his opinion. Indeed, he was indifferent to his duty to NMU as well, as he knew that Perry's participation in the Officers Pension Plan had been challenged by the plaintiffs (which challenge was later sustained by this court and the Court of Appeals). Moreover, he knew, or should have known, that NMU made quarterly payments to the Officers Pension Plan equal to 26% of the compensation paid *for that quarter,* and, as pointed out by Karchmer, the payments were made without specific application to any beneficiary, as there were no separate accounts for beneficiaries.
>
> The court concludes with regret that Freedman acted with reckless indifference to his duty as trustee. Therefore, as trustee, he will be subject to surcharge for the lump sum pension paid to Perry."

Freedman's accountability thus rests not only upon his neglect but also upon his "reckless indifference to his duties as trustee".

Freedman testified at pretrial and at trial (394-409a; 502-580a).* The District Court had an opportunity to ob-

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* References to the joint appendix filed in the Court of Appeals will be followed by a letter or letters of the alphabet in lower case.

serve him as a witness. Freedman's behavior was such that a finding of "recklessness" on his part was forced in spite of the understandable reluctance of the District Court (A31). There has been no exceptional showing that would warrant the review here of these findings confirmed by the Court of Appeals (*Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275).

The quality of Freedman's behavior may not be weighed in a vacuum. Reference must be made to the setting—to the frame in which he acted. He became a trustee of the NMU Officers' Fund in 1964 after the enactment of the LMRDA. He was not only a trustee, he was also attorney for NMU and the trustees. He had acted as attorney for Curran, Wall and Perry in this action. As the District Court found, Freedman allowed himself to be dominated by Curran (A33). He knew that Perry was a close and intimate friend of Curran. At Curran's beck, he had drawn the strange contract. This contract had attempted to assure Perry a salary up to October 21, 1974 (Plaintiffs' Exhibit 13, 800z-800aa) regardless of earlier termination for any cause short of a voluntary retirement. But favorable as it was to Perry it failed to make any provision for the acceleration of Perry's pension (800z).

In his haste to humor Curran and Perry, Freedman did not even inquire into the circumstances of Perry's leave taking. At the trial he professed to believe that these circumstances made no difference (565a). He knew that whatever these circumstances may have been, Curran had acted in strict accord with Perry's wish.

Since November, 1968, after the plaintiffs' preliminary notice had been served, Perry had been laying the groundwork for retirement. He sought and obtained a statement of his pension (lump sum). In December he had Curran pay to the trustees a contribution of $41,250.01 (508a) on his account up to October, 1974. These steps are not reconcilable with a firing in good faith by Curran on January 16, 1969.

Freedman had never given thought to Perry's rights on a voluntary retirement *versus* his rights upon an *ex parte* termination of the contract by NMU (564-566a). There is no suggestion that he had ever given thought to the matter of the acceleration of Perry's pension rights upon an early termination; that he had ever given thought to the problem of how pension rights under the Plan, a Plan approved by the membership—could be altered by a simple contract; or that he had ever given thought to the matter of discounting the accelerated payments to Perry (546a-551a).

The District Court was quite justified in characterizing Freedman's opinion as having been given from "the top of his head"—an opinion on the basis of which Perry would pocket nearly $400,000 including his accelerated salary from NMU.

Freedman's opinion (888-889a) was dictated on the very day of Perry's retirement over the telephone from Philadelphia, transcribed in New York and signed "Abraham E. Freedman" by his assistant. All this came after the plaintiffs' preliminary notice and at a time when the plaintiffs would shortly be ready to file a complaint. The whole affair smacked of a race to beat the plaintiffs to the gun.

The District Court went on to find that, while the other two trustees had acted carelessly in making such payment, their culpability did not reach the petitioner's height of recklessness.

Petitioner's Alleged Reason for His Application

None of the reasons advanced by the petitioner falls within the guidelines (Rule 19) for the granting of writs of certiorari and none would otherwise justify the granting of such a writ.

As to Petitioner's First Reason

The petitioner argues that the District Court was without jurisdiction to surcharge Abraham E. Freedman under the provisions of LMRDA, Title 29 U.S.C. § 501; that the trustees of the Officers' Pension Plan were not representatives of a labor organization.

This argument fails for several reasons:

(1)

The decision below does not conflict with decisions of other circuits. In fact, it is consistent with all decisions in which the point was raised. [See *Hood* v. *Journeymen Barbers, Hairdressers, etc.* (CA7), 454 F.2d 1347, in which the identical argument was made; *Robinson* v. *Weir* (D.C. Neb.) 277 F. Supp. 581, in which the surety on a trustee's bond was subjected to suit under § 501(a); *Aho* v. *Bintz* (D.C.Minn.), 290 F. Supp. 577, in which representatives of an international union were held to be "representatives" of the local union under § 501(a) when occupying positions of trust with regard to the local and its members.]

The source of the fund held by the trustees was dues paid by NMU members. No part of the fund represented outside contributions. The usual and customary union pension or welfare funds have resulted from negotiations with employer groups and the employers have made the contributions to the fund. However, this fund is unique in that the union members themselves have created the fund for the benefit of their elected officers. Under these circumstances the trustees could represent none other than the labor organization which created the trust. Unlike the trustees in *Tucker* v. *Shaw* (E.D.N.Y.), 308 F.Supp. 1, relied upon by the petitioner, the trustees here did not represent the employer organizations.

As the District Court said (A32):

> "For the purposes of Section 501(a), the funds paid by NMU to the Officers' Pension Plan and by it to Perry were funds of NMU."

The respondents were enforcing rights of the union as they had a right to do under § 501. They were not enforcing rights of outside interests. Unless the union can protect and conserve the trust against the wrongful acts of the trustees, then the fund is without protection.

(2)

The trustees were selected and designated by NMU to hold money contributed solely by NMU. Having been so selected and designated, they necessarily were "representatives" of the Union.

(3)

On the facts in this case the trustees were under the domination and control of Joseph Curran, as President of NMU, and for that reason alone must be regarded as union representatives under § 501(a). As the District Court further found (A33):

> "The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers' Pension Plan to Perry."

(4)

The money had been wrongfully paid by NMU to the Officers' Pension Plan and had been wrongfully paid out by the trustees of the Plan. It follows that the trustees were properly joined as defendants in the action to recover those funds. In fact, they were necessary parties. That being so, even if § 501(a) were not intended to embrace trustees within the term "representatives", the Dis-

trict Court had pendent jurisdiction to determine the surcharge issue. Only by exercising such pendent jurisdiction could complete relief be granted.

Here the claim against the trustees under § 501(a) to recover the money wrongly paid to the Plan for the account of non elected persons including William Perry and the claim against the trustees for their wrongful payment out to William Perry "derive from a common nucleus of operative facts". The parties are the same in the proceeding to enforce each such claim. All of the elements of a proper pendent jurisdiction are present. As Mr. Justice Brenman said in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, at page 725:

> "The state and federal claims must derive from a common necleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."

As Mr. Justice Brenman pointed out (p. 726) "pendent jurisdiction is a doctrine of discretion" in the Court and its exercise will not be disturbed unless abused.

As to the Petitioner's Second Reason

As a second reason the petitioner argues that he was judged by standards of conduct which differed from those by which his co-trustees were judged, and that he was thereby denied due process of law.

His argument here begs the question. The same standards were in fact applied. But by those same standards the Courts below found that Freedman was more culpable than his co-trustees. While the co-trustees had acted care-

lessly and negligently, they had had no prior knowledge of the plaintiffs' notice that a payment to Perry would be wrong and they did have Freedman's advice, as counsel, that the payment to Perry would be proper.

As shown above the Court below distinguished Freedman's position by pointing to certain facts which did not relate to his co-trustees.

There is nothing strange or unusual or lacking in due process in holding one trustee liable and his co-trustees blameless when the facts justify a distinction.

As to Petitioner's Third Reason

The petitioner has made the strange assertion that NMU was not damaged by the wrongful payment to William Perry.

This is indeed a desperate argument. Freedman in effect says that the creator of a trust has no standing to demand an accounting for improper trustee action.

The argument falls of its own weight. NMU is vitally interested in keeping the Pension Plan adequately funded. If the Fund could be depleted by improper payments, the Union would assuredly be morally if not legally obligated to restore the fund to the point of actuarial soundness. It is obvious that NMU retained an economic interest in the Fund and was damaged when the Fund was damaged.

The argument seems to be that the fund was adequately funded even after the payment to Perry and, that being so, the surplus was up for grabs and no one was hurt. This is absurd, particularly absurd when coupled with the fact, as found by the District Court, that "Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry" (A33). If the union, through its members, may not act, then who

can or will? If the members here had not acted, the Court could have done so on its own motion. Obviously the trustees would never have acted.

As to Petitioner's Fourth, and Last, Reason

The petitioner argues that the Court below did not properly apply the New York law. He argues that under New York Trust Law "willful misconduct" must be equated with "intentional wrongdoing".

If by this he means that malice or an intention to do harm are necessary elements, the petitioner has misinterpreted the law of New York. The New York law, as well as the law of most common law jurisdictions, defines "willful misconduct" as either an act intentionally done in reckless disregard of consequences *or* a negligent act done intentionally. Neither malice nor intention to harm is a necessary element of willful misconduct. Whether or not the behavior of a trustee amounts to willful misconduct is generally a question of fact and left to the triers of facts.

Thus Mr. Justice Frankenthaler in *Harvey* v. *Guaranty Trust Co.* (Sup.Ct., N.Y.Co.), 134 Misc. 417, aff'd 229 App. Div. 774, aff'd 256 N.Y. 526, quoted with approval from *May* v. *New York Motion Picture Corp.*, 45 Cal. App. 396, as follows at page 427:

> "In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the person knows what he is doing, intends to do what he is doing, and is a free agent."

And the Court of Appeals for the District of Columbia approved the following instruction to a jury in *KLM* v. *Tuller*, 292 F.2d 775, cert. denied 368 U.S. 921:

> "* * * willful misconduct is the intentional performance of the act * * * in some manner as to imply reckless disregard of the consequences * * *."

The difference between simple negligence and willful misconduct has been described by these two illustrations:

First a driver passes a red traffic light. He is driving carelessly and does not observe the red light. He is guilty of simple negligence.

The second driver sees the red light but nevertheless decides to take the chance. However, he does not intend any harm. He is guilty of willful misconduct.

Freedman's behavior was comparable to the second driver. There were many red lights flashing in Freedman's face. He saw them and recklessly took a chance.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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